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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LEONARD L. HARRISON IV, a Minor,
etc.,

Plaintiff and Appellant,

v.

WILDOMAR LITTLE LEAGUE et al.,

Defendants and Respondents.

E033492

(Super.Ct.No. RIC 362359)

OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger,
Judge. Affirmed.

Palitz & Associates and William Waldron for Plaintiff and Appellant.

Gibbs & Fuerst, Michael T. Gibbs and Kevin L. Borgen for Defendants and
Respondents.

Plaintiff Leonard L. Harrison IV, a minor, by and through his guardian ad litem,
Leonard L. Harrison III (Harrison), appeals from a judgment entered in favor of
defendants Wildomar Little League and Andrew Martinez (Martinez, collectively

Defendants) after their motion for summary judgment was granted. Harrison claims that the trial court erred in finding that Defendants met their burden of proving that he could not prevail on his cause of action for reckless misconduct. He also claims that the trial court erred in determining that Martinez's conduct was not reckless as a matter of law. We affirm.

FACTS AND PROCEDURAL HISTORY¹

On June 26, 2000, Harrison, then 14 years old, was practicing baseball for the all-star team at a city-owned field in Lake Elsinore. Martinez, an adult coach, was pitching batting practice and Harrison was playing first base. After taking a throw from a teammate, Harrison noticed that the lacing on his glove had broken. He told Martinez, who waved at him. He then started across the field behind the pitcher's mound to get a replacement glove. When Harrison got behind him, he believed that Martinez was about to make another pitch and told him to wait. It appeared Martinez heard him because he

¹ Neither party has complied with the rules of court in preparing their briefs. Harrison has failed utterly to cite to the record in support of his contentions of fact. This is a violation of California Rules of Court, rule 14 (a)(1)(C). Further, Defendants cite solely to their separate statement of material facts. The rule requires the parties to point to *actual* evidence in the record. The *separate statement* is not evidence but merely refers to evidence, which the court must then seek out. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178, fn. 4.) “[I]t is counsel’s duty to point out portions of the record that support the position taken on appeal. The appellate court is not required to search the record on its own [A]ny point raised that lacks citation may, in this court’s discretion, be deemed waived. [Citation.]” (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) A violation of the rules of court may also result in the striking of the offending document, the imposition of fines and/or the dismissal of the appeal. (*Ibid.*) While counsel are admonished regarding their future

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stopped and held the ball down to his side, and Harrison continued across the field behind him. As he stood on the third base line approximately 60 feet from home plate waiting for a teammate to give him a glove, Harrison was hit in the head by a batted ball.

Harrison filed a complaint against Defendants alleging premises liability and general negligence. Defendants subsequently filed a motion for summary judgment or, in the alternative, summary adjudication. Harrison opposed the motion by asserting a new theory of liability, “intentional reckless conduct.” The trial court found that Harrison’s negligence cause of action was barred by the doctrine of primary assumption of the risk. And, while the record is unclear, it must also have concluded that because the field where the accident occurred is a public park, Defendants could not be held on a premises liability theory. Still, the record demonstrates that the trial court professed to grant summary judgment as to the premises liability cause of action, but only summary adjudication as to the negligence cause of action.

Given leave by the trial court, Harrison then filed a first amended complaint against Defendants alleging a single cause of action for reckless misconduct. Defendants filed a second motion for summary judgment on the ground that Martinez’s conduct in pitching the ball was not reckless as a matter of law. The trial court found that the activity here involved was an inherent risk of the game of baseball, i.e., a pitcher will throw a ball, without checking to see if everyone is prepared or adequately equipped, to a

[footnote continued from previous page]

filings with this court, in the instant case, in spite of the failures in the briefing, we will exercise our discretion to consider the merits of the appeal.

batter who hits it causing it to strike someone on or off the field. It concluded that Defendants therefore had no duty to Harrison and granted summary judgment in their favor. Judgment was entered on March 11, 2003. This appeal followed.

DISCUSSION

A. Allowing Harrison to File a First Amended Complaint Was Not Error

Preliminarily, Defendants argue that the appeal should fail because Harrison should not have been allowed to file a first amended complaint in order to defeat their first summary judgment. That action is prohibited by authorities such as *Residential Capital v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 829, and *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342-1343. These cases stand for the proposition that a motion for summary judgment need only address the issues raised by the complaint and need not speculate as to theoretical possibilities not pled. While this argument was mentioned only briefly below, and was by no means fully developed, the fact that it is arguably raised for the first time on appeal is typically fatal to the argument so raised only if, contrary to the present case, it does not concern a pure issue of law. (*Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 77-78.)

Because a motion for summary judgment need only address the issues framed by the complaint, it appears that the trial court was required to grant summary judgment in favor of Defendants, having found in their favor on those issues. (Code Civ. Proc., § 437c, subd. (c).) However, here the trial court threatened to postpone its ruling on the

first summary judgment in order to allow Harrison to amend his complaint. In essence, it accepted Harrison's opposition as a motion for leave to file an amended complaint, and indicated that it would grant a continuance of the hearing on the motion for summary judgment in order to allow an amendment to be filed. Such a procedure is acceptable and, typically, a decision to grant a continuance is a matter within the sound discretion of the trial court, which we may not disturb absent a finding that its decision exceeds the bounds of reason by being arbitrary, capricious or patently absurd. (*Schlothman v. Rusalem* (1953) 41 Cal.2d 414, 417; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1265-1266 (*Distefano*).)

While the trial court's methodology in this case was procedurally unusual, we cannot say, in light of its inherent discretion to manage its calendar as it saw fit (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967), that the trial court acted outside its discretion in granting Harrison leave to amend his complaint. Such requests are generally liberally granted. (*Solit v. Tokai Bank* (1999) 68 Cal.App.4th 1435, 1448.) The fact that the granting of summary adjudication on two of the three causes of action that would have been pled in the first amended complaint preceded the actual filing of that complaint (hence only one cause of action remained when the complaint was actually filed) is not a ground for denying Harrison's request for a reversal of the judgment.

Defendants argue that the trial court was not in a position to grant Harrison's request for leave to amend as it was not made by noticed motion as required by Code of Civil Procedure section 473 and California Rules of Court, rule 327. (See also *Hall v.*

Department of Adoptions (1975) 47 Cal.App.3d 898, 904.) However, it is self-evident that these rules were established primarily with due process to the nonmoving party in mind. Defendants have not filed a cross-appeal claiming that the trial court's ruling abridged their right to due process, and thus cannot forward such a claim as a reason to deny Harrison's appeal. Had they done so, given the procedural posture of this case and the policy of the law, our ruling would likely have remanded the case to the trial court with instructions to carry out proceedings in conformity with the law. In light of our ruling below, we doubt this is the result that Defendants would prefer from this appeal.

B. Summary Judgment Was Properly Granted

1. Standard of Review

The purpose of summary judgment “is to provide courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 844 (*Aguilar*)). Our de novo review is governed by Code of Civil Procedure section 437c, which provides in subdivision (c) that a motion for summary judgment may only be granted when, considering all of the evidence set forth in the papers and all inferences reasonably deducible therefrom, it has been demonstrated that there is no triable issue as to any material fact and the cause of action has no merit. The pleadings govern the issue to be addressed. (*City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1121.) A defendant moving for summary judgment bears the burden of persuasion that there is no triable issue. This burden is met by producing evidence that

demonstrates that a cause of action has no merit because one or more of its elements cannot be established to the degree of proof that would be required at trial, or that there is a complete defense to it. Once that has been accomplished, the burden shifts to the plaintiff to show, by producing evidence of specific facts, that a triable issue of material fact exists as to the cause of action or the defense. (*Aguilar, supra*, 25 Cal.4th at pp. 849-851, 854-855.)

2. Defendants Shifted the Burden to Harrison to Show A Triable Issue of Material Fact and He Failed to do so.

Harrison alleged a single cause of action for reckless misconduct in an attempt to avoid the bar of primary assumption of the risk. Primary assumption of the risk exists in those instances where a legal conclusion is made that a defendant has no duty to protect a plaintiff from a particular risk. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308, 314-315 (*Knight*).) The determination whether or not a defendant has a duty to protect a plaintiff from a particular risk of harm depends upon the nature of the activity in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity. (*Id.* at pp. 309, 314-315.) The *Knight* court recognized that in the sports setting “conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself.” (*Id.* at p. 315.) Still, *Knight* recognized that conduct that is intended to cause harm or that is reckless can not be excused merely because certain activities carry an inherent risk. (*Id.* at p. 320.)

In their motion for summary judgment defendants asserted that being struck by a baseball was an inherent risk of participating in the game and that Martinez’s conduct in

pitching the ball without ensuring that Harrison was paying attention was not reckless as a matter of law. Defendants argued that in response to their first motion for summary judgment the trial court determined that the doctrine of primary assumption of the risk applied and thus barred Harrison's negligence cause of action. That decision therefore could not be relitigated. (Code Civ. Proc., § 437c, subd. (n)(1); *Conway v. Bughouse, Inc.* (1980) 105 Cal.App.3d 194, 202-203.)

The doctrine of primary assumption of the risk applies only if the participants' conduct gives rise to a risk that is inherent in the activity. According to *Knight*, if the conduct of a participant in a sport is not "totally outside the range of the ordinary activity involved in the sport," then it is not so reckless as to prevent application of the doctrine of primary assumption of the risk. (*Knight, supra*, 3 Cal.4th at p. 320, fn. omitted.) Thus, the trial court's determination that the doctrine of primary assumption of the risk applies to this case necessarily included a determination that Martinez's conduct was not reckless. (See, e.g., *Record v. Reason* (1999) 73 Cal.App.4th 472, 487 (*Record*) ["In order to determine whether primary assumption of risk applied, the trial court was obliged to focus on whether respondent's conduct was reckless"].) Because Harrison could not relitigate this issue, the trial court properly granted Defendants' second motion for summary judgment.

On appeal, Harrison does not challenge the trial court's determination that the doctrine of primary assumption of the risk applies in this case. Rather, he merely states that the undisputed facts give rise to a triable issue that Martinez was reckless, and that

the issue must, of necessity, be determined by a jury. His failure to challenge the trial court's application of primary assumption of the risk abandons that issue and is fatal to this appeal. (*Long v. Cal.-Western States Life Ins. Co.* (1955) 43 Cal.2d 871, 883 [grounds for appeal not mentioned in briefs deemed abandoned].) Nevertheless, we will consider certain of the arguments that Harrison did raise.

First, he urges that whether an actor's conduct rises to reckless behavior is an issue of fact, and is therefore unsuitable to be determined on summary judgment. On the contrary, in *Knight*, it was the Supreme Court that determined whether the defendant's conduct was reckless so as to preclude the operation of the doctrine of assumption of the risk. (*Knight, supra*, 3 Cal.4th at pp. 320-321.) This practice has been followed by other courts since that time. (*West v. Sundown Little League of Stockton, Inc.* (2002) 96 Cal.App.4th 351, 361 (*West*); *Mastro v. Petrick* (2001) 93 Cal.App.4th 83, 91-92; *Distefano, supra*, 85 Cal.App.4th at pp. 1274-1275; *Record, supra*, 73 Cal.App.4th at pp. 484-485.)

Contrary to Harrison's suggestion, the Supreme Court's recent decision in *Kahn v. East Side Union High School Dist.* 31 Cal.4th 990 does not mandate otherwise. There, the court simply found that the evidence created triable issues of fact whether the defendant's failure to provide proper diving instruction as well as his promises and threats fell outside the range of ordinary activity involved in coaching the sport of competitive swimming. It does not require that the issue of recklessness be determined by a jury in all cases.

Harrison also argues that the facts of this case would support a jury finding of recklessness. In general, only conduct that “will very probably cause harm” rises to the level of reckless and wanton conduct. (*Donnelly v. Southern Pacific Co.* (1941) 18 Cal.2d 863, 869.)

Harrison argues that Martinez should not have pitched the ball, and that doing so when he knew or should have known that Harrison was on the third base line and not in a position to protect himself was reckless. However, being hit with a thrown or batted baseball is an inherent risk of the sport, even for mere spectators. (*Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703, 707, 713; *West, supra*, 96 Cal.App.4th at pp. 353, 359; *Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47, 51-52; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123; *Mann v. Nutrilite, Inc.* (1955) 136 Cal.App.2d 729, 734-735; *Brown v. San Francisco Baseball Club* (1950) 99 Cal.App.2d 484, 487-488.) Martinez had no duty to decrease that risk by not throwing the ball. (*Distefano, supra*, 85 Cal.App.4th at pp. 1275-1276.) Further, the consequence that Harrison would be struck in the head by a batted ball was not so inevitable as to transform Martinez’s action in throwing a pitch, without ensuring that Harrison was paying attention, from negligence to recklessness.

Harrison also claims that Martinez was reckless because Harrison twice reminded him that he should not make a pitch while Harrison was crossing the field. However, pleas for caution have been held to be of no avail since it is “the nature of the sport itself” and not “the particular plaintiff’s subjective knowledge and . . . expectations . . .” that

matter when determining inherent risk. (*Knight, supra*, 3 Cal.4th at p. 313; see also *Record, supra*, 73 Cal.App.4th at pp. 482-484.) Thus, even if he could overcome the other obstacles to the relief that he seeks, Harrison did not establish the existence of a triable issue of material fact that Martinez acted recklessly.

DISPOSITION

The judgment is affirmed. Defendants to recover their costs on appeal.

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RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

WARD

J.